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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1381

ROBERT GEORGE DRUMMOND, *et al.*,
Petitioners,

v.

FULTON COUNTY DEPARTMENT OF FAMILY AND CHILDREN SERVICES, *et al.* and TIMOTHY LEE HILL,
Respondents.

NO. 77-6454

TIMOTHY LEE HILL,
Petitioner,

v.

FULTON COUNTY DEPARTMENT OF FAMILY AND CHILDREN SERVICES, *et al.* and ROBERT GEORGE DRUMMOND, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS FULTON COUNTY DEPARTMENT OF FAMILY AND CHILDREN SERVICES, et al.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS FULTON COUNTY DEPARTMENT OF FAMILY AND CHILDREN SERVICES, et al.

INTRODUCTION

The Respondents Fulton County Department of Family and Children Services, *et al.* [hereinafter "Respondents"] accept the OPINIONS BELOW and JURISDICTION

sections of the Petitions for both Robert George Drummond, *et al.* [hereinafter "the Drummonds," whose Petition will be cited as D. Pet. ___], and Timothy Lee Hill [hereinafter "Timmy," whose petition will be cited as T. Pet. ___], but seek the Court's indulgence in a rephrasing of the QUESTIONS PRESENTED and STATEMENT OF THE CASE in accordance with Respondents' understanding of the case.

QUESTIONS PRESENTED

1. Do foster parents have a "liberty interest" under the Due Process Clause in their relationship to a child temporarily placed in their foster care such that the decision on their application to adopt the child can be made only after a formal due process administrative hearing?

2. Is a child whose natural parents' rights have been terminated by court order, and for whom a state agency has been named the sole legal guardian, deprived of due process when that agency makes custodial and adoption decisions for the child without the child having an independent representative and the right to an adversarial hearing on such decisions?

3. If either the foster parents or foster child has a sufficient "liberty interest" to warrant application of procedural due process protections, do the administrative and judicial procedures available in Georgia fail to provide whatever process is due?

4. Is a state agency, charged with the responsibility of placing for adoption a child in its legal custody, constitutionally prohibited from taking into consideration the race of the child and the race of the prospective adoptive parents when making the adoption decision for the child?

STATEMENT OF THE CASE

This is the second time the tripartite controversy involving the Drummonds, Timmy and Respondents has been presented to this Court on a Petition for Writ of Certiorari. The present case is the federal phase of multifaceted litigation commenced by the Drummonds in an effort to prevent Respondents, Timmy's legal guardians, from removing Timmy from the Drummonds' home and placing him for adoption with another couple.

The Drummonds were approved as foster parents by Respondents, and, as such, were selected for their ability to give infants short-term care on an emergency basis. In December, 1973, in an emergency situation, a one-month old mixed race child named Timmy was placed for temporary care in the home of the Drummonds, who are white. The Drummonds' care of Timmy lasted for nearly two years while Respondents first attempted to rehabilitate Timmy's natural mother and then brought court action to terminate all parental rights to Timmy. During those two years, the Drummonds were repeatedly apprised of the temporary status of their care, were discouraged from any interest in adopting Timmy, and were advised that, if they desired, they were eligible to adopt an older child.

After Respondents obtained legal custody of Timmy in September, 1975, the Drummonds formally applied to adopt him. They were interviewed pursuant to normal agency procedures and in November, 1975, a group of approximately 18 professional adoption personnel and

social workers was convened to review the information obtained in the interviews, to evaluate the extensive foster care record of the Drummonds, and to make a decision on their adoption application. After a lengthy discussion, the group voted 17 to 1 to deny the application. Among the reasons for the decision were the Drummonds' health, age, community environment, intellectual capacity, and attitudes relevant to the child's mixed race. As to the latter, it was thought that the Drummonds denied Timmy's racial heritage, were racially naive, lacked the proper experiences to best raise a mixed-race child, and that Timmy would be better off in a black home than the Drummonds' home. (Timmy is now placed with a young, professional mixed-race couple who will adopt him if permitted by the courts.)

After being refused a formal administrative hearing, the Drummonds brought this action in the United States District Court for the Northern District of Georgia, alleging that their due process and equal protection rights were violated, and seeking an injunction against removal of Timmy from their home. A temporary injunction was granted, but, after a consolidated trial on the merits, the Drummonds' case was dismissed by Judge Charles Moye, who found that there were no constitutional violations and that considerations of race were permissibly directed to the child's best interest. *Drummond v. Fulton County Department of Family and Children Services*, 408 F.Supp. 382 (N.D. Ga. 1976). (Re-printed at page 153 of the Appendix to the Drummonds' Petition, hereinafter referred to as A.___.) That decision was appealed.

The Drummonds then brought an action in state superior court alleging the same constitutional violations and, in addition, alleging state grounds for relief and seeking adoption of the child. Another restraining order was granted on January 23, 1976, but was dissolved on March 19, 1976, when the Drummonds' case was dismissed after a three-day presentation of their evidence. The Georgia Supreme Court subsequently affirmed the dismissal, and this Court refused to grant the Drummonds' Petition for Writ of Certiorari. *Drummond v. Fulton County Department of Family and Children Services*, 237 Ga. 449, 228 S.E.2d 839 (1976), *cert. denied*, 432 U.S. 905 (1977). A. 157.

In the interim, on February 2, 1977, the United States Court of Appeals for the Fifth Circuit issued a 2 to 1 decision, written by Judge Tuttle, reversing the trial court, and holding that the Drummonds and Timmy has a constitutionally protectable interest in their close familial relationship, and that Timmy should be allowed to intervene. In addition, the Court concluded that the Drummonds' contention that they had been denied equal protection of the laws because this familial relationship had been broken by the State solely on account of race required a due process hearing to determine the veracity of their contention.

Respondents' Motion for Rehearing En Banc was granted by the full Court of Appeals on March 28, 1977. After considering supplemental briefs and oral argument, the *en banc* Court, in a 13 to 2 decision, held that none of the theories advanced by the Drummonds provided an adequate foundation to support their claim to a protectable interest under the Due Process Clause of the Fourteenth Amendment. Similarly, the *en banc* Court rejected Timmy's claim to an independent, personal liberty interest based on a "right to a stable environment." Although concluding that there was no liberty interest of "full-fledged constitutional magnitude," the *en banc* Court

noted that the procedures supplied by Respondents were adequate to protect whatever undefined interests might exist in the case.

Moreover, the *en banc* Court gave careful consideration to the equal protection question, which was predicated solely on the allegation of use of arbitrary racial classifications in the adoption proceeding, and not only upheld the district court's finding that the Drummonds' application was not rejected automatically on racial grounds, but also squarely held that the consideration of race as a relevant factor in adoption is constitutionally permissible.

It is from this decision that the Drummonds and Timmy are now petitioning this Court for a Writ of Certiorari.

ARGUMENT

I. THE LOWER COURT'S DETERMINATION ON THE DUE PROCESS QUESTION IS CORRECT AND PRESENTS NO CONFLICT OF DECISIONS

A. The Denial of a Protectable Interest to the Foster Family Relationship in this Case Is Consistent with *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977)

Both the Drummonds and Timmy claim that the *en banc* Court has erroneously decided a question left open by this Court in *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977) [hereinafter referred to as "*OFFER*"]: Whether a foster family relationship has a liberty interest warranting due process protections when a foster child is removed for placement with other than his natural parents.

Contrary to these claims, the *en banc* Court gave careful consideration to the *OFFER* decision before deciding correctly, and in complete harmony with *OFFER*, that neither the Drummonds nor Timmy had a protectable liberty interest in this case. A. 20, 22-23. Recognizing that where "the claimed interest derives from a knowingly assumed contractual relation with the State, it is appropriate to ascertain from state law the expectations and entitlements of the parties," *OFFER*, *supra*, at 845-846, the *en banc* Court explained the temporary nature of foster home care under the applicable statutes. A. 14-15.

Georgia law, which establishes the foster care relationship, neither creates rights in the foster parents, *Drummond v. Fulton County Department of Family and Children Services*, 237 Ga. 449, 228 S.E.2d 839 (1976), A. 157, nor gives rise to a justifiable expectation that the relationship will be left undisturbed, *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972). These facts, together with the fact that the theory of the "psychological family" claimed bythe Drummonds, D. Pet. 17, has been subject to substantial criticism, *see, e.g.*, Strauss and Strauss, "Beyond the Best Interest of the Child," 74 Colum. L. Rev. 996 (1974), and has "never been recognized as equivalent to either the natural family or the adoptive family by any court," A. 17, amply support the Court's conclusion that the foster family relationship in the context of this case is not a protected liberty interest, but an interest limited by the state law which created it. *Bishop v. Wood*, 426 U.S. 341 (1976).

Furthermore, any independent, personal liberty interest in Timmy based upon the novel theory of a "right to a stable environment" is properly foreclosed by this Court's

rejection of a similar argument in *OFFER*, *supra*, at 840.

Therefore, there is no merit in the contention that this case presents a conflict with *OFFER* that needs to be reviewed by this Court.

B. The Court of Appeals Correctly Interpreted Recent Decisions of this Court in Deciding that the Drummonds Had Not Shown any Liberty Interest in "Reputation-Plus" Which Requires Procedural Due Process

The Drummonds, in their second effort to assert a protectable liberty interest, claim that the decision to deny them the right to adopt Timmy and to remove him from their home not only cast a stigma on their reputation, but also "attached a disability" to them in some fashion. D. Pet. 20.

There is no question but that "[w]here a person's good name, reputation, honor or integrity is at stake" one may, under proper circumstances, have a protectable interest requiring notice and hearing. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). In the present case, however, there is no suggestion whatever that the Drummonds' "good name, reputation, honor or integrity" is at stake; nor is there any suggestion that the State, in declining to approve their adoption of Timmy, "imposed on [them] a stigma or other disability that *foreclosed* [their] freedom to take advantage of other [adoption] opportunities." *Board of Regents v. Roth*, *supra*, at 573. (bracketed matter and emphasis supplied).

In considering the Drummonds' claim in this regard, the *en banc* Court found three bases for its ruling that the Drummonds had failed to show any liberty interest in "reputation–plus," A. 13, which requires procedural due process:

First, the Drummonds have not passed the first hurdle of showing that any of the State's findings about them were defamatory: "Their treatment of Timmy as foster parents was spoken of in glowing terms." A. 19. This lack of any defamation at all makes unnecessary the next step of determining the existence of another tangible interest required to transform reputation alone into either "liberty" or "property" sufficient to invoke the procedural protection of the Due Process Clause. *Paul v. Davis*, 424 U.S. 693, 699 (1976).

Second, the Drummonds have not met the criteria of *Codd v. Velger*, 429 U.S. 624 (1977), in that they have not alleged any relevant factual errors in the state agency's information or findings. A. 19. In their Petition, the Drummonds argue to the contrary: that there are "factual errors in regard to the agency misapplying its age policy, that the agency made errors about the community in which the Drummonds lived, about their racial attitudes, about Mrs. Drummond's health, etc." D. Pet. 22. However, never have the Drummonds alleged that the State recorded inaccurate factual information material to their *reputation*. There has been no recordation of information about them comparable to charges of being a public drunkard, *Wisconsin v. Constantineau*, *supra;* of being a shoplifter, *Paul v. Davis*, *supra;* of being dishonest or immoral, *Roth*, *supra* at 573; of attempting suicide, *Codd v. Velger*, *supra;* or of conduct unsuited to an officer, *Bishop v. Wood*, *supra*. "Here, the sole finding about the Drummonds is that in the judgment of the agency, they are not the best available parents for Timmy, at least in part for a reason beyond their control, *i.e.*, their race." A. 19. This is not the type of information that supports a "stigma to reputation" claim and all of the Drummonds' arguments in this regard go to "the adequacy or even the

existence," *Codd v. Velger*, *supra*, at 626, of reasons for the denial of their adoption application. Such an approach might be relevant if the Drummonds had a protectable interest in adopting Timmy and, thus, an independent right to a hearing to determine whether their application had been denied justifiably. However, in the case of a stigmatization—liberty claim standing alone, the only reason for a hearing is to clear one's name of a stigma which might arise from inaccurate facts concerning one's *reputation*.

Finally, the absence of publication of any defamatory charges against the Drummonds is fatal to their claim of a liberty interest under the rationale of *Bishop v. Wood*, 426 U.S. 341 (1976). The Drummonds have alleged in their Petition that the *en banc* Court "misinterpreted *Bishop v. Wood* as requiring public dissemination of the negative information." D. Pet. 21. Such an allegation, however, ignores the clear language in *Bishop v. Wood* where, after noting that "the asserted reasons for the . . . decision were communicated orally to the petitioner in private," Mr. Justice Stevens ruled that

> "[s]ince the former communication was not made public, it cannot properly form the basis for a claim that petitioner's interest in his 'good name, reputation or integrity' was thereby impaired." *Bishop v. Wood*, *supra*, at 348. (footnote omitted).

Clearly, then, these recent decisions of this Court support the *en banc* Court's decision that the Drummonds have not shown a liberty interest in "reputation-plus" which requires constitutional protection.

C. Assuming, *Arguendo*, the Presence of any Protectable Interests in this Case, Respondents' Procedures Are Constitutionally Adequate

The *en banc* Court examined the administrative procedures followed by Respondents and found, to the extent there were any undefined, but protectable, interests in this case, that Respondents' procedures comported with the test articulated by this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976). A. 25. The *en banc* Court properly focused on the crucial second prong of the *Mathews v. Eldridge* test, *i.e.*, an assessment of the present risk of erroneous deprivation and the probable value of additional or substitute procedural safeguards in relation to the private and government interests involved.

The present administrative procedure regarding agency adoptions in Georgia is designed to maximize information in answering the vital question, "what placement is in the best interest of the child?" Several interviews are had with the prospective adoptive parents; the child is observed and tested medically and mentally; background data is collected on the child's natural family; and the decision is made by qualified professionals.

> "In sum, the present system seems designed to obtain the most accurate answer possible to the ultimate difficult question and the risk of error is minimized. There has been no indication that additional or more accurate information could be produced at a more structured trial-type hearing that would lead to a superior decision about Timmy's placement." A. 27.

Thus, Georgia's administrative procedures, when viewed in light of *Mathews v. Eldridge*, *supra*, clearly provide the Drummonds and Timmy whatever process they may be due.

In addition, should the foster parents be dissatisfied with the decision of the Respondents in any case, a judicial forum is available to review their complaints. In cases such as this, the juvenile court has jurisdiction over the child in question, having placed the child with Respondents in the first place. Any person may file a petition with the involved juvenile court requesting the modification of any order concerning such a child on the ground that changed circumstances require the modification for the best interests of the child, Ga. Code § 24A-2801(b). Alternatively, such a petition may be filed seeking a protective order for the benefit of the child when any action by the legal custodian of the child is or may be detrimental to the child, Ga. Code § 24A-3401(a). Thus, foster parents can obtain a full judicial review of an adoption decision prior to the child's removal from their home. In fact, the Drummonds here went to the juvenile court attempting to block the removal of Timmy, had a hearing on the issue, and failed in their attempt. However, the mere fact of their failure in this circumstance simply supports the correctness of Respondents' position and does not diminish the availability of a judicial forum to aggrieved foster parents.

The sum total of all of these procedures provides foster parents with a preremoval judicial vehicle by which they may question, from the perspective of the best interests of the child, the denial of their adoption application and the planned removal of the child from their home to another home for purposes of adoption. In all respects, such procedures are just as protective as the New York § 392 status review upheld in *OFFER*, and, because not limited to children in foster care at least 18 months, the Georgia procedures are arguably more protective than

New York's § 392 hearings. Thus, there is no need for this Court to assess the adequacy of the due process accorded the Drummonds and Timmy.

II. THE DECISION ON THE EQUAL PROTECTION QUESTION IS CLEARLY CORRECT

Although this Court has said that "[p]roof of racially discriminatory intent or purpose is required to show a violation" of the Equal Protection Clause, *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 265 (1977), the Drummonds and Timmy nevertheless continue to contend that a non-discriminatory consideration of race in the adoption context also denies them equal protection of the laws.

The District Court found that the Drummonds' adoption application was not automatically rejected on racial grounds, A. 155, and the Court of Appeals *en banc* refused to disturb this finding because it was not clearly erroneous. A. 7. The crucial question then became whether a state agency, charged with the responsibility of placing for adoption a child in its custody, may take into consideration the race of the child and the race of the prospective adoptive parents without violating the Equal Protection Clause of the United States Constitution.

An affirmative answer to this question is justified by "the difficulties inherent in interracial adoption," *Compos v. McKeithen*, 341 F.Supp. 264, 266 (E.D. La. 1972) (three judge court) and supported by a vast body of sociological literature, *e.g.*, L. Grow and D. Shapiro, *Black Children, White Parents: Study of Transracial Adoptions* (Research Center, Child Welfare League of America, 1974). Moreover, a non-discriminatory consideration of race in the transracial adoption context is race-

neutral, *Geduldig v. Aiello*, 417 U.S. 484, 496, n. 20 (1974), and inflicts "no racial slur or stigma with respect to whites or any other race." *United Jewish Organization of Williamsburg, Inc. v. Carey*, 430 U.S. 144, 165 (1977).

Such a non-discriminatory consideration of the race of prospective adoptive parents and children is analagous to a consideration of the parties' religion, which has been sustained against constitutional attack in both federal, *e.g.*, *Wilder v. Sugarman*, 385 F.Supp. 1013 (S.D.N.Y. 1974) (three-judge court) and state cases, *e.g.*, *Dickens v. Ernesto*, 30 N.Y.2d 346, 331 N.Y.S.2d 346, 281 N.E.2d 152, *appeal dismissed*, 407 U.S. 916 (1972). See generally Annot., "Religion as a Factor in Adoption Proceedings," 48 A.L.R. 3d 383 (1973). Surely race, even more than religion, *should be* considered, and not to do so would be in callous disregard of the child's needs.

> "Indeed, adoption personnel would be blinking at reality if they failed to consider the race of the adoptive child vis-a-vis the child. . . . Granted that society and the community should not harbor attitudes against interracial mixture, the subject of the foster home placement and even adoption is the child, whose life will be affected by community values and prejudices as they exist, not as they ought to be." A. 32.

The *en banc* Court's decision on the equal protection question is factually and legally correct, totally in keeping with the realities of today's world, and does not merit plenary review by this Court.

CONCLUSION

For all of the above and foregoing reasons, both Petitions for a Writ of Certiorari in this case should be denied.

Respectfully submitted,

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